IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Writ Petition No. 1141 (S/B) of 2002

Union of India through Secretary,
Ministry of Defence, South Block,
New Delhi & others. ……. Petitioners

Versus

Central Administrative Tribunal,
Allahabad Bench, Allahabad & another …… Respondents

Mr. P.C. Bisht, learned Standing Counsel, Govt, of India.
Mr. Narayan Dutt, learned counsel for respondent No. 2.

Coram: Hon'ble P.C. Verma, J.,
Hon'ble B.S. Verma, J.

Dated: August 21, 2004

(Per Hon'ble P.C. Verma, J.)

1. This writ petition has been filed challenging the judgment and order dated 05.07.2002 passed by the Central Administrative Tribunal, Allahabad in O.A. No. 1568 of 1994.

2. Brief facts of the case are that the respondent No. 2 Dr. Surendra Kumar Virmani joined his service on temporary basis as Astt. Surgeon Grade I (Male) in Ordance Factories Organizations at Ordnance Parachute Factory Kanpur on 3.7.1969. Initially, he was on probation, for 3 months. After the completion of this period of probation, the respondent No. 2 was allowed to continue further on temporary basis, as the regular incumbents selected by UPSC were not available. After the IIIrd Pay Commission Report, he was re-designated as Junior Medical Officer (Temporary) w.e.f. 1.1.73 in the pay scale of Rs. 650-1200 and then he was transferred to Ordnance Factory, Dehradun w.e.f. 1.7.78. He joined at the transferred place on 12.7.78. It is stated by the petitioners that the post of Astt. Surgeon Grade I was re-designated as Junior Medical Officer and respondent No. 2 did not qualify the UPSC, so he was not regularised to the

permanent post of Junior Medical Officer nor he was finally selected by the UPSC. Petitioners have stated that the services of respondent No. 2 being purely temporary, were subject to Central Civil Service (Temporary Services) Rules, 1965. The service of respondent No. 2 was, therefore, terminated by the order of Director General of Ordnance Factory in exercise of power under Rule 5 of CCS (Temporary Service) Rules, 1965 by way of notice dated 3.7.1980. The said notice dated 3.7.1980 was served on respondent No. 2 on 19.7.1980 and as such, his services were terminated w.e.f. 18.8.1980 and therefore, a Factory order dated 7.8.1980 was issued providing that the services of the respondent No. 2 shall stand terminated w.e.f. 18.8.1980.

3. Being aggrieved by this order of termination, the respondent No. 2 filed a petition challenging the said order in the Court of Civil Judge, Dehradun, which was registered as Suit No. 312 of 1983. This suit was transferred to Central Administrative Tribunal, Allahabad Bench at Lucknow as Transfer Application No. 1406 of 1986. It was finally disposed of vide order dated 29th January, 1992. The application was allowed and the termination notice dated 3.7.1980 was quashed and the petitioners herein were directed to consider the case of the respondent NO. 2 for regularisation without requiring him to appear for interview, but after perusing his ACRs. Accordingly, the case of the respondent No. 2 was sent to the UPSC for regularisation, who considered the ACRs of the respondent No. 2. But, the respondent No. 2 was not found suitable for regularisation. The decision of the UpSC was communicated vide letter dated 14.1.1993 addressed to the Secretary, Ministry of Defence. The said decision of the UPSC was also communicated to respondent No. 2 vide letter dated 10.3.1993. However, the second part of the judgment dated 29.1.1992 regarding the reinstatement of respondent No. 2 was implemented and he was reinstated in service vide Ordnance Factory Board, Kolkata letter dated 13.9.1996. Respondent No. 2 was also offered pay and allowances for the period between the date of

judgment i.e. 29.1.1992 and 14.1.1993. which is the date of UPSC letter communicating that respondent No. 2 was not found suitable for regularisation). The payment of pay and allowances for the period prior to the date of judgment was not offered in the absence of any such directions in the judgment dated 29.1.1992. Meanwhile, the respondent No. 2 filed a contempt petition, which was dismissed by Central Administrative Tribunal vide order dated 7.7.1997.

4. Thereafter, when UpSC, New Delhi vide letter dated 14.1.1993 did not recommend the regularisation of the services of the respondent No. 2, which was intimated to the respondent No. 2 vide letter dated 10.3.1993, respondent No. 2 filed another petition bearing O.A. No. 1568 of 1994 before the Central Administrative Tribunal, Allahabad and sought his regularisation. Petitioners contested the said petition and filed their counter affidavit. Central Administrative Tribunal, Allahabad, however, vide its judgment dated 5.7.2002 allowed the O.A. No. 1568 of 1994 in favour of respondent No. 2 and granted the following reliefs to the respondent No. 2:

i. In the facts and circumstances O.A. is allowed. UPSC letter dated 14.1.1993 and para 3 of Factory Order Pt. II NO. 1185 dated 19.9.1996 are quashed.

ii. The application shall be deemed to be reinstated w.e.f. 19.8.1980 as per order dated 13.9.1996 of respondent No. 3. The applicant shall be allowed to work on the post of Junior Medical Officer and he will be entitled for the pay and allowances w.e.f. 19.8.1980 revised from time to time as applicable in the grade of Junior Medical Officer.

iii. The implementation of this order shall be ensured by respondent No. 2 within one month from the date of communication of this order.

iv. As regards the arrears respondents shall pay such arrears of pay and allowances w.e.f. 19.8.1980 till the date of reinstatement minus payment if any made earlier within 3

months and continue paying the monthly pay and allowances when due in future.

v. The respondents are directed to consider the case of the applicant for regularisation in consultation with UPSC without requiring the applicant to appear for interview after perusing the ACRs within a period of 3 months from the date of communication of this order.

vi. Award of Rs. 2,000/- (Rupees Two thousand only) to the applicant to be paid by respondent No. 2 within 3 months.

5. Being aggrieved by this judgment of the Central Administrative Tribunal dated 5.7.2002, the petitioners have preferred this writ petition.

6. We have heard learned counsel for the parties and gone through the records.

7. The Tribunal vide its judgment dated 29th January, 1992 has remitted the matter back to the UPSC directing the UPSC to consider the case of the respondent No. 2 for regularisation. The UPSC, after considering the service record of the respondent No. 2, found the respondent No. 2 to be average in his performance and held him unsuitable to be absorbed. The Tribunal reconsidered the matter and again, directed by the order impugned dated 5.7.2002 to the UPSC to reconsider the matter of the respondent No. 2 for absorption. Learned counsel for the petitioners submitted that the Tribunal could not remand the matter for re-consideration in as much as the UPSC had already evaluated the service record of the respondent No. 2 and assed him to be average and accordingly, held him unsuitable. There would be no change even if the matter is reconsidered by the Commission.

8. On confronted with a query by the Court to the effect that whether there exists any adverse material on the service record of the respondent No. 2 or not, which could only render the respondent No.

2 unsuitable for absorption, the learned counsel for the petitioners fairly submitted that there is no adverse material in the service record of the respondent No. 2. The suitability for absorption is to be judged on the basis of adverse material, if any, in the service record. A candidate cannot be held to be unsuitable for merger only because of his performance being average. Average performance may be a factor, which is counted in the matter of promotion while judging the merit. Merely, on the basis of average performance, a candidate cannot be held to be unsuitable for absorption.

9. Therefore, in our opinion, the Tribunal has rightly remitted the matter back to the UPSC for reconsideration of respondent No. 2 for absorption. We do not find any infirmity or illegality in the order of the Central Administrative Tribunal. The writ petition is devoid of merit and is liable to be dismissed.

10. Accordingly, the writ petition is dismissed. No order as to costs.

(B.S. Verma, J.) **(P.C. Verma, J.)**

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